

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CHARLES R. BAKER,)	
)	
Plaintiff,)	
)	
v.)	Case No. 10-2273-V
)	
)	JURY TRIAL DEMANDED
ISTA PHARMACEUTICALS, INC.)	
)	
Defendant.)	

**DEFENDANT'S COMBINED MOTION FOR (1) DISMISSAL FOR FAILURE TO
STATE A CLAIM, AND (2) DISMISSAL FOR LACK OF SUBJECT MATTER
JURISDICTION FOR LACK OF STANDING; OR ALTERNATIVELY, MOTION TO
STAY PENDING THE DECISION OF A RELEVANT CASE CURRENTLY ON
APPEAL BEFORE THE FEDERAL CIRCUIT**

COME NOW DEFENDANTS and move this Court to dismiss Plaintiff's Complaint for three separate reasons:

First, Plaintiff's Complaint fails to allege any facts which show that Defendants falsely marked any products with any expired patent number. Second, Plaintiff's Complaint fails to plead sufficient facts to support a plausible claim that defendant acted with the intent to deceive the public. The complaint lacks the heightened pleading requirements for fraud under Federal Rule of Civil Procedure 9(b) because it contains only a conclusory assertion of intent to deceive. Third, the complaint fails to allege any concrete injury resulting from the alleged false patent marking, and therefore, the "hard floor" of Article III standing is absent and there is no subject matter jurisdiction. Therefore, the Complaint should be dismissed pursuant to Rule 12 of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

In the alternative and notwithstanding the lack of factual pleading in Plaintiff's Complaint, should the Court find that the pending decision before the Federal Circuit—*Stauffer v. Brooks Brothers*—be instructive in this case, Defendant requests a stay pending that decision.

In support of this Combined Motion, Defendant relies upon a Memorandum of Law submitted in conjunction with this Motion.

WHEREFORE, Defendant moves this Court to grant their Motion to Dismiss and for other such relief to which they may be entitled.

Respectfully submitted,

s/ Adam S. Baldridge

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*Attorneys for Defendant ISTA Pharmaceuticals
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2010, a copy of the foregoing document was served on all counsel of record via the Court's ECF system:

s/ Adam S. Baldridge
Adam S. Baldridge